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No. (1)

Supreme Court, U.S.
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In The

Supreme Court of the United States

ROSEN ALEXANDROV RUSEV and
GALINA YORDANOVA RUSEVA,

Petitioners,

vs.

PETER D. KEISLER,
Acting Attorney General of the United States,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the circuit court erred in denying the petition for review of a motion to reopen for ineffective assistance of counsel where the motion was filed when Petitioners became aware of prior counsel's misconduct, and upon complying with the procedural prerequisites which the Board of Immigration Appeals and circuit court require, and thus their motion was timely and their actions diligent.

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OPINION BELOW

The Ninth Circuit Court of Appeals did not select its opinion for publication in the Federal Reporter. Its pertinent rulings are reprinted in the appendix at App. 1, App. 8, App. 10 and App. 23. The Board of Immigration Appeals did not select its opinion for publication. Its pertinent rulings are reprinted in the appendix at App. 4, App. 6 and App. 14.

STATEMENT OF JURISDICTION

The Supreme Court has appellate jurisdiction pursuant to 28 U.S.C. § 1254. Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;
>
> (2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

The denial of a motion to reopen is a final administrative decision generally subject to judicial review in the court of appeals. *See Sarmadi v. INS*, 121 F.3d 1319, 1321-22 (9th Cir. 1997) (concluding

"that other recent changes to the INA did not alter our traditional understanding that the denial of a motion to reconsider or to reopen generally does fall within our jurisdiction over final orders of deportation"); *Singh v. Ashcroft*, 367 F.3d 1182, 1185 (9th Cir. 2004) (permanent rules); *see also* 8 U.S.C. § 1252(b)(6) ("When a petitioner seeks review of an order under this section, any review sought of a motion to reopen or reconsider the order shall be consolidated with the review of the order").

The circuit court has held that it has jurisdiction over the BIA's denial of a motion to reopen even where the underlying request for relief is discretionary. *See Arrozal v. INS*, 159 F.3d 429, 431-32 (9th Cir. 1998) (holding that § 309(c)(4)(E) of the transitional rules did not bar review of the denial of petitioner's motion to reopen to apply for suspension). Specifically, "[t]he review of a motion to reopen in this context is distinct from the direct review of a denial of suspension of deportation, which is precluded when the BIA makes discretionary determinations of the threshold eligibility requirements." *Rodriguez-Lariz v. INS*, 282 F.3d 1218, 1223 (9th Cir. 2002) (holding that the court retained jurisdiction to review denial of motion to reopen arguing ineffective assistance of counsel and exceptional circumstances). *See also de Martinez v. Ashcroft*, 374 F.3d 759, 761 (9th Cir. 2004) (holding that the court retained jurisdiction to review denial of motion to reopen to apply for adjustment of status); *Medina-Morales v. Ashcroft*, 371 F.3d 520, 527 (9th Cir. 2004) (holding that § 1252(a)(2)(B)(i) did not preclude review over the "discretionary aspects of

the BIA's denial of Medina-Morales' motion to reopen" to apply for adjustment of status); *Zazueta-Carrillo v. Ashcroft*, 322 F.3d 1166, 1169-70 (9th Cir. 2003) (holding that § 1252(a)(2)(B)(i) did not bar review of the denial of a motion to reopen to apply for adjustment of status).

CONSTITUTIONAL PROVISION INVOLVED

No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. U.S. Const. amend. V.

STATEMENT OF THE CASE

This is an immigration case in which Petitioners, Rosen Alexandrov Rusev and his wife, Galina Yordanova Ruseva, were found removable on January 14, 2002, by an immigration judge in Phoenix, Arizona, for failing to establish a fear of returning to Bulgaria on one of five enumerated grounds required for asylum. Administrative Record ("A.R.")[1] 251.

On August 13, 2004, the Board of Immigration Appeals ("BIA") affirmed the Immigration Judge's ("IJ") decision without opinion. A.R. 220. On September 4,

[1] The A.R. referred to in this brief is the Administrative Record for case number 05-73947.

2003, Petitioners timely appealed the IJ and BIA decision to the circuit court. On February 22, 2005, the court dismissed in part and denied in part the petition for review.[2] A.R. 16, 18-20. On September 24, 2004, Petitioners, through new counsel, filed a motion to reopen with the BIA based on ineffective assistance of counsel. A.R. 184. On December 23, 2004, the BIA denied the motion to reopen as untimely. A.R. 105. Subsequently, Petitioners' sought review of the BIA's denial of their motion to reopen with the circuit court.[3] On April 28, 2005, while the case was pending with the circuit court, Petitioners filed a second motion to reopen before the BIA. A.R. 37. On June 10, 2005, the BIA denied the motion to reopen. A.R. 2. The Petitioners again sought review of the BIA's denial of their motion to reopen with the circuit court.[4] On September 19, 2005, the circuit court issued an order *sua sponte* consolidating case numbers 05-70170 and 05-73947. The circuit court further dismissed the Respondent's motion for summary affirmance. The circuit court granted a stay in case number 05-70170 and denied the stay of removal filed in case number 05-73947 as unnecessary. On February 28, 2007, the Ninth Circuit denied the petitions for review, in case numbers 05-70170 and 05-73947. Petitioners filed a petition for rehearing and for rehearing *en banc*. In an order dated July 13, 2007,

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[2] *Rusev v. Ashcroft*, No. 05-73195.

[3] *Rusev v. Gonzales*, No. 05-70170.

[4] *Rusev v. Gonzales*, No. 05-73947.

the circuit court panel voted to deny rehearing and for rehearing *en banc*.[5] This timely petition for writ of certiorari ensued.

STATEMENT OF FACTS

The Petitioners are husband and wife, both natives and citizens of Bulgaria. They entered the U.S. on June 29, 1991, at Los Angeles, as non-immigrant visitors for pleasure and were authorized to stay in the U.S. until December 28, 1991. A.R. 639. On February 3, 1998, the then Immigration and Naturalization ("INS"),[6] now Department of Homeland Security, placed the Petitioners in removal proceedings by the issuance of a Notice to Appear ("NTA"). The NTA alleged the Petitioners were subject to removal pursuant to section 237(A)(1)(B), 8 U.S.C. § 1227(A)(1)(B) of the Immigration and Nationality Act ("INA"), in that after admission as a non-immigrant under INA § 101(a)(15), 8 U.S.C. § 1101(a)(15) they had remained in the U.S. for a time longer than permitted. A.R. 639.

On April 7, 1998, at a hearing before the Immigration Judge ("IJ"), the Petitioners admitted the

[5] *Rusev v. Gonzales*, Nos. 05-70170, 05-73947.

[6] On March 1, 2003, the Immigration and Naturalization Service ceased to exist as an agency under the U.S. Department of Justice and became part of the newly-formed Department of Homeland Security.

factual allegations and conceded removability. A.R. 256-57. The Respondents requested relief in the form of suspension of deportation under the Nicaraguan Adjustment and Central American Relief Act (NACARA) provisions and also asylum. *See* Pub.L. No. 105-100, as amended by Pub.L. No. 105-139, Pub.L. No. 106-386, Pub.L. No. 106-554, and Pub.L. No. 109-162.

At an individual hearing on January 14, 2002, the Court designated Bulgaria as the country of removal. A.R. 246. The IJ deemed the Petitioners ineligible for relief under NACARA, as they entered the U.S. subsequent to December 31, 1990, approximately six months too late to afford them NACARA relief. *Id.* at 247. While the asylum application was filed timely on December 31, 1991, entry to the U.S. was also required before December 31, 1990. *Id.* at 247. The Petitioners did not enter the U.S. until June 29, 1991.

The male Petitioner submitted an application for political asylum based on fear of persecution in Bulgaria due to political opinion. A.R. 247, 421. At the conclusion of the hearing, the IJ denied the Petitioner's application for asylum and withholding of removal finding the Petitioner had not shown a likelihood of persecution if he returned to Bulgaria. A.R. 252.

The Petitioners filed a timely appeal with the Board of Immigration Appeals ("BIA"), on January 24, 2002. On August 13, 2002, the Petitioners' appeal was dismissed. A.R. 220. It is important to note that the Petitioners' prior counsel, Dorothea Kraeger (hereinafter "attorney Kraeger"), never filed a BIA

brief on their behalf, despite repeatedly telling the Petitioners that she had, in fact, filed a brief on their behalf. A.R. 90. She is currently disbarred. A.R. 50-51. Thus, attorney Kraeger failed in her duty to represent her client.

On September 4, 2003, present counsel was retained to file an appeal to the U.S. Court of Appeals for the Ninth Circuit based on the BIA's denial of Petitioners' applications for asylum and withholding of removal. On February 22, 2005, the court dismissed in part, and denied in part, the petition for review.[7] A.R. 16, 18-20.

On September 24, 2004, Petitioners, through counsel, filed a motion to reopen with the BIA based on a claim of ineffective assistance of counsel. A.R. 184. On December 23, 2004, the BIA denied the motion as untimely. A.R. 104. In doing so, the BIA determined that the deadline for filing a motion to reopen was not "equitably tolled" because Petitioner's did not act with due diligence in filing their motion to reopen. *Id.* Petitioner's sought review of the BIA's denial of the motion to reopen.[8] In the interim, on April 28, 2005, the Petitioners filed a second motion to reopen with the BIA. A.R. 37. The BIA denied that motion to reopen on June 10, 2005. A.R. 1. The Petitioners again sought review of the BIA's denial of

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[7] *Rusev v. Ashcroft*, Case No. 03-73195.

[8] *Rusev v. Gonzales*, Case No. 05-70170.

their motion to reopen with the circuit court.[9] On September 19, 2005, the Ninth Circuit issued an order *sua sponte* consolidating case numbers 05-70170 and 05-73947. It further dismissed the Respondent's motion for summary affirmance. The court granted a stay in case number 05-70170 and denied the stay of removal filed in case number 05-73947 as unnecessary.

On February 28, 2007, the Ninth Circuit denied the petitions for review, in case numbers 05-70170 and 05-73947. Petitioners filed a petition for rehearing and for rehearing *en banc*. In an order dated July 13, 2007, the Ninth Circuit panel voted to deny rehearing and for rehearing *en banc*.

REASONS FOR GRANTING THE PETITION

THIS COURT SHOULD GRANT THE PETITION BECAUSE THE PETITIONER ACTED DILIGENTLY UPON LEARNING OF PRIOR COUNSEL'S MISCONDUCT

A. Motions to Reopen Generally

A motion to reopen must be in the form of a written motion to the BIA. 8 C.F.R. § 1003.2(a) (2005). The decision to grant or deny a motion to reopen is within the discretion of the Board. *Id.* The BIA has discretion to deny a motion to reopen even if the

[9] *Rusev v. Gonzales*, No. 05-73947.

moving party has made out a prima facie case for relief. *Id.* A motion to reopen must be filed within 90 days of the date of entry of a final administrative order of removal. *See* 8 C.F.R. § 1003.2(c)(2) (2005).

A motion to reopen shall state new facts that will be proven at a hearing to be held if the motion is granted and shall be supported by affidavits or other evidentiary material. 8 C.F.R. § 1003.2(c)(1) (2005). "A motion to reopen proceedings shall not be granted unless it appears to the BIA that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing; nor shall any motion to reopen for the purpose of affording the alien an opportunity to apply for any form of discretionary relief be granted if it appears that the alien's right to apply for such relief was fully explained to him or her and an opportunity to apply therefore was afforded at the former hearing, unless the relief is sought on the basis of circumstances that have arisen subsequent to the hearing." *Id. See also INS v. Abudu*, 485 U.S. 94, 107-08 (1988).

The BIA may deny a motion to reopen in under three circumstances: 1) failure of an applicant to make a prima facie case for the underlying substantive relief sought; 2) failure to reasonably explain under 8 C.F.R. § 1003.2 why information was not available sooner; and 3) denial under discretionary grounds. *INS v. Abudu*, 485 U.S. 94, 107-08 (1988).

The BIA has described a prima facie case as one in which "the evidence reveals a reasonable likelihood

that the statutory requirements for relief have been satisfied." *Matter of S-V-*, 22 I&N Dec. 1306, 1308 (BIA 2000) (citations omitted). The BIA has not required a conclusive showing that eligibility for relief has been established. *Id.* The BIA has reopened proceedings "where the new facts alleged, when coupled with the fact already of record, satisfy [the BIA] that it would be worthwhile to develop the issues further at a plenary hearing on reopening." *Id.* In making that determination, the BIA does not require a conclusive showing that relief would be granted because it is not ruling on the ultimate merits on deciding reopening. *Matter of L-O-G-*, 21 I&N Dec. (BIA 1996); *Orondez v. INS*, 345 F.3d 777, 784-87 (9th Cir. 2003) (quoting *Matter of S-V-*, 22 I&N Dec. 1306, the Court reversed the BIA's denial of respondent's motion to reopen because it failed to accept respondent's declaration as true and because it impermissibly made an adverse credibility finding because some part, but not all, of the evidence respondent sought to produce could have been produced previously).

Although in this case, the Petitioners did not file their first motion to reopen with the BIA until approximately one year after the BIA rendered its decision, the Petitioners did file their motion to reopen within 90 days of filing their bar complaint against attorney Kraeger. Both of the motions to reopen the Petitioners' case stated new facts and were supported by affidavits or other evidentiary material. *See* 8 C.F.R. § 1003.2(c)(1) (2005).

The evidence the Petitioners sought to offer in this case is material, was not available, and could not have been discovered or presented at the former hearing because the Petitioners were not aware of the ineffective assistance. *Id. See also INS v. Abudu*, 485 U.S. 94, 107-08 (1988). As a result, the Petitioners merited a reopening in their case. If the BIA had ever received an appellate brief in the Petitioners' asylum case, the outcome may have been different, as the Petitioners were eligible for asylum.

B. Ineffective Assistance of Counsel

A respondent is denied counsel where counsel has been ineffective. *Roe v. Flores-Ortega*, 528 U.S. 470, 482-83 (2000) (Sixth Amend. right to counsel violated where defendant can show reasonable probability that he would have appealed case); *Rodriguez-Lariz v. INS*, 282 F.3d 1218, 1226-27 (9th Cir. 2002) (respondent's due process right to counsel was violated where notary and lawyers working for them failed to timely file suspension application); *Dearinger ex rel. Volkova v. Reno*, 232 F.3d 1042 (9th Cir. 2000) (applying *Flores-Ortega* to Fifth Amend. immigration context where counsel filed notice in Circuit Court of Appeals one day late); *Castillo-Perez v. INS*, 212 F.3d 518, 526-27 (9th Cir. 2000) (ineffective assistance of counsel is a denial of due process and the remedy is to remand and apply law on suspension that existed at time error was made which was pre-IIRIRA (Illegal Immigration Reform and Immigrant Responsibility Act)).

"Ineffective assistance of counsel in a deportation proceeding is a denial of due process under the Fifth Amendment if the proceeding was so fundamentally unfair that the alien was prevented from reasonably presenting his case." *Ortiz v. INS*, 179 F.3d 1148, 1153 (9th Cir. 1999). A due process violation requires a showing of prejudice, which can be made if counsel's performance "was so inadequate that it may have affected the outcome of the proceedings." *Iturribarria v. INS*, 321 F.3d 899, 890 (9th Cir. 2003).

The courts may not consider an ineffective assistance of counsel claim unless it was raised before the BIA or the Immigration Court either directly or through a motion to reopen. *Goonsuwan v. Ashcroft*, 252 F.3d 383 (5th Cir. 2001) (habeas dismissed because ineffective assistance of counsel claim had to be raised by motion to reopen before BIA in transitional rule case governed by 106(c) exhaustion requirement); *Bernal-Vallejo v. INS*, 195 F.3d 56, 63-65 (1st Cir. 1999).

The remedy for ineffective assistance is to restore the respondent to his prior position. In *Castillo-Perez v. INS*, 212 F.3d at 528, the Court determined that the appropriate remedy for an ineffective assistance claim was to remand the case to the BIA with instructions that the agency apply the law in existence at the time the claim should have been made. However, in *Castillo-Perez*, the BIA denied the motion to reopen for suspension on the grounds that post-IIRIRA the applicant was ineligible.

"Where the ineffective performance was that of an actual attorney and the attorney engaged in fraudulent activity causing an essential action in her client's case to be undertaken ineffectively, out of time, or not at all, equitable tolling is available." *Iturribarria*, 321 F.3d at 889. *See also Fajardo v. INS*, 300 F.3d 1018 (9th Cir. 2002); *Rodriguez-Lariz v. INS*, 282 F.3d 1218; *Varela v. INS*, 204 F.3d 1237 (9th Cir. 2000); *Lopez v. INS*, 184 F.3d 1097 (9th Cir. 1999).

The filing deadline may be tolled until the petitioner, exercising due diligence, discovers the fraud, deception, or error. *Iturribarria*, 321 F.3d at 889. In cases involving ineffective assistance, this Court has found that the limitation period may be tolled until the petitioner meets with new counsel to discuss his file, thereby becoming aware of the harm resulting from the misconduct of his prior representative. *Id.*; *Rodriguez-Lariz,* 282 F.3d at 1223-26 (numerical limitation on motions to reopen where ineffective assistance of counsel in failure to file for suspension); *Varela*, 204 F.3d 1237 (numerical limitation on motions to reopen is equitably tolled where second motion was filed after person was defrauded by notary purporting to provide legal representation). *See Valeriano v. Gonzales*, 474 F.3d 669, 673 (9th Cir. 2007). Moreover, the limitations period is tolled until the petitioner 'definitively learns' of counsel's defectiveness. *See Singh v. Gonzales*, 491 F.3d 1090, 1096 (9th Cir. 2007) (*citing Albillo v. Gonzales*, 410 F.3d 1090, 1100 (9th Cir. 2005)).

In *Socop-Gonzalez v. INS*, 272 F.3d 1176, 1193 (9th Cir. 2001) (en banc), the circuit court applied equitable tolling where INS officer repeatedly provided erroneous information to the applicant. The Court held that equitable tolling is available "in situations where, despite all due diligence, [the party invoking equitable tolling] is unable to obtain vital information bearing on the existence of the claim." *Id.* The inability to obtain vital information bearing on the existence of a claim need not be caused by the wrongful conduct of a third party. Rather, the party invoking tolling need only show that his or her ignorance of the limitations period was caused by circumstances beyond the party's control." *Id.*

In *Rojas-Garcia v. Ashcroft*, 339 F.3d 814 (9th Cir. 2003) this Court found that *failure to file a brief on appeal to the BIA constitutes ineffective assistance*, but affirmed the denial of habeas because the petitioner could not show prejudice.

In the instant matter, Petitioners can show prejudice because had the appellate brief been filed with the BIA, it could have persuaded the BIA that Petitioners merited asylum or withholding of removal relief. This form of relief was available to Petitioners and the government never argued that they were *ineligible,* rather they argued that their case was not persuasive.

Furthermore, pursuant to 8 C.F.R. § 1003.1(e)(4), the BIA may summarily affirm the decision of the Immigration Judge, without opinion, if the Board

member determines that the result reached in the decision under review was correct; that any errors in the decision under review were harmless or nonmaterial; and that issues on appeal are squarely controlled by existing BIA or federal court precedent and do not involve the application of precedent to a novel factual situation; or the factual and legal issues raised on appeal are not so substantial that the case warrants the issuance of a written opinion in the case. 8 C.F.R. § 1003.1(e)(4)(i)(A)-(B) (2005). Due to no appellate brief being filed by Petitioners' former counsel, attorney Kraeger, the BIA's review of Petitioners' case was certainly not on the merits of Petitioners' applications for asylum or withholding of removal. Petitioners had a claim that could have succeeded on the merits, despite the Immigration Judge's decision, had it been properly pursued by attorney Kraeger. "The presumption of prejudice arising from [the Petitioners'] former attorney's failure to file an appellate brief [with the BIA] has not been rebutted." *Singh v. Ashcroft*, 367 F.3d at 1190.

Furthermore, although Petitioners hired present counsel on September 4, 2003, to represent them in their Ninth Circuit appeal of the denial of their asylum and withholding case, Petitioners were still unaware that attorney Kraeger had failed to file any brief with the BIA. In hindsight, as stated in Petitioners' bar complaint, it became apparent that attorney Kraeger never filed a brief. A.R. 171, 173. However, attorney Kraeger continuously denied that a brief had not been filed and assured the Petitioners

that the brief had, in fact, been filed. A.R. 90. This is ineffective assistance coupled with fraudulent or deceptive conduct. *See Iturribarria*, 321 F.3d at 889.

The BIA erroneously assumed that the denial of their asylum case put the petitioners on notice that attorney Kraeger had been ineffective in August 2003. This is incorrect. The BIA did not mention in its opinion that the Petitioner did not file a brief in their case. Petitioners were not even aware that no BIA brief was filed until much later. Petitioners did not even notify attorney Kraeger that they were filing a bar complaint against her until August 2004. Furthermore, the State Bar of Arizona did not issue a Probable Cause Order against attorney Kraeger until November 2004. Petitioners were simply not aware that they had been deceived until approximately one year after the BIA issued its decision in Petitioners' asylum/withholding of removal appeal. Petitioners cannot have been expected to file a Motion to Reopen for ineffective assistance of counsel, before they were even aware of the ineffective assistance. *See Socop-Gonzalez*, 272 F.3d at 1193.

On July 14, 2004, once Petitioners became aware that attorney Kraeger deceived them and necessary evidence was compiled, Petitioners filed a complaint with the State Bar of Arizona. A motion to reopen was timely filed within 90 days on September 24, 2004. Therefore, the 90-day filing deadline after a final administrative order for a petitioner seeking to reopen on the basis of ineffective assistance of counsel, should be tolled.

The BIA has determined criteria for ineffective assistance of counsel in *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988) (where ineffective assistance of counsel claim raised must (1) have motion supported by affidavit setting forth agreement and representations by counsel; (2) inform counsel against whom the claim is made and give counsel opportunity to respond; (3) reflect in motion whether bar charge has been filed and if not, why not); *See also Matter of Rivera-Claros*, 21 I&N Dec. 599 (BIA 1996) (elaborating on criteria related to bar complaints).

The circuit court does not require strict adherence to *Lozada*. *See, e.g., Rodriguez-Lariz v. INS*, 282 F.3d 1218, 1226-27 (9th Cir. 2002) (respondent "substantially" complied with *Lozada* in asserting violation of due process right to counsel where notary and lawyers failed to file for suspension); *Escobar-Grijalva v. INS*, 206 F.3d 1331, 1334-35 (9th Cir. 2000) (Lozada requirements need not be followed where the record demonstrates the ineffective assistance); *Castillo-Perez v. INS*, 212 F.3d at 524-28 (9th Cir. 2000) (same); *Ontiveros-Lopez v. INS*, 213 F.3d 1121, 1124-25 (9th Cir. 2000) (abuse of discretion to strictly adhere to *Lozada*).

In the instant matter, attorney Kraeger's misconduct was not readily apparent. She continuously and repeatedly misled the petitioners by claiming that a brief had in fact been filed. A.R. 90. Even after the Petitioners' apparent discovery that a brief had not been filed, attorney Kraeger argued that a brief had in fact been filed. *Id.* Here, the record did not

demonstrate the ineffective assistance of counsel. In fact, the BIA's decision of August 13, 2003, is silent as to the ground that the Board affirmed the decision of the Immigration Judge. A.R. 219. Nor does the decision reveal whether or not a brief was in fact filed and considered by the Board. *Id.* Yet, without elaboration, the BIA attributes knowledge of the ineffective assistance of counsel on the date of the denial. It cannot be assumed that every dismissal of an appeal is based upon ineffective assistance of counsel, as the BIA apparently did here.

Further, the BIA requires that a bar complaint be filed prior to filing a motion to reopen based upon ineffective assistance of counsel. *See Lozada,* 19 I&N Dec. 637. On July 14, 2004, Petitioners filed a bar complaint with the State Bar of Arizona, and attorney Kraeger is now suspended, in part, based upon the Petitioners' complaint. A.R. 50-51, 90. On September 28, 2004, Petitioners, through current counsel filed a motion to reopen based upon ineffective assistance of counsel. Petitioners were in fact diligent in pursuing their motion to reopen upon learning of the extent of attorney Kraeger's misconduct and satisfying the BIA's prerequisites for a motion to reopen for ineffective assistance under *Lozada*, 19 I&N Dec. 637. Even though the Ninth Circuit does not require strict adherence of the *Lozada* requirements, it does follow *Lozada*. *See, for example, Rojas-Garcia v. Ashcroft*, 339 F.3d 814 (*citing Castillo-Perez v. INS*, 212 F.3d at 526), "we have approved of the *Lozada* requirements and held that 'under ordinary circumstances the BIA

does not abuse its discretion when it denies a motion to remand or reopen based on alleged ineffective assistance of counsel where petitioner fails to meet the requirements of *Lozada*.'" *Castillo-Perez*, 212 F.3d at 525.

The BIA, in its denial of the Petitioners' second motion to reopen makes the same argument as it did in denying the first motion to reopen: in short, the motion to reopen was filed late, as was the first motion to reopen. A.R. 2. Although current counsel was hired to pursue a Petition for Review of the BIA's denial of their asylum application with this Court, the BIA assumes in its second decision denying Petitioner's second motion to reopen that because the Petitioners hired current counsel on September 4, 2003, the first motion to reopen should have been filed at that time. *Id.* The BIA contends that "[t]he fact that Kraeger was placed on interim suspension by the Supreme Court of Arizona on March 23, 2005, does not excuse the lateness of the motion." Petitioners never used Kraeger's suspension as an *excuse* for late filing; however, Petitioners do argue that a motion to reopen for ineffective assistance of counsel could not have been filed before they were made aware of the ineffective assistance.

Although the Petitioners' asylum case was heard before the Ninth Circuit, and dismissed in part and denied in part, the outcome could have been different had the Petitioners' had the representation that they thought they had, both before the IJ and the BIA. *Failure to file a brief on appeal to the BIA constitutes*

ineffective assistance. Rojas-Garcia v. Ashcroft, 339 F.3d 814. The Petitioner was diligent in pursuing his appeals and motions to reopen when he had sufficient knowledge to pursue a motion to reopen. As a result, this case should be reopened and remanded for the taking of further evidence or for reconsideration.

CONCLUSION

In this case, the BIA denied two motions to reopen filed by the Petitioners. Both motions to reopen were based on their prior attorney's ineffective assistance of counsel. The Petitioners filed their original motion to reopen as soon as they became aware of the ineffective assistance in their case. As a result, the 90-day filing deadline for motions to reopen should be equitably tolled, as the Petitioners filed their motion to reopen within 90 days of learning of the misconduct and filing a bar complaint against their previous attorney.

The Petitioners' case was substantially prejudiced by their prior attorney's failure to file an appellate brief with the BIA. Therefore, the Petitioner's case should be re-opened and remanded for the taking of further evidence.

RESPECTFULLY submitted this 11th day of October 2007.

CHRISTOPHER J. STENDER, ESQUIRE*
STENDER AND POPE, P.C.
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*Counsel of Record
Attorney for Petitioners

223 Fed.Appx. 634

United States Court of Appeals, Ninth Circuit.

Rosen Alexandrov **RUSEV**; et al.,

Petitioners,

v.

Alberto R. GONZALES, Attorney General,

Respondent.

Nos. 05-70170, 05-73947.

Submitted Feb. 20, 2007.*

Christopher J. Stender, Esq., Stender & Pope, PC, Phoenix, AZ, for Petitioners.

Ronald E. Lefevre, Chief Counsel, Office of the District Counsel Department of Homeland Security, San Francisco, CA, District Director, Office of the District Chief Counsel, U.S. Department of Homeland Security, Phoenix, AZ, Mark C. Walters, Esq., Jennifer L. Lightbody, Esq., U.S. Department of Justice Civil Div./Office of Immigration Lit., Washington, DC, for Respondent.

On Petition for Review of an Order of the Board of Immigration Appeals. Agency Nos. A71-597-582, A71-597-583.

Before: BEEZER, FERNANDEZ, and McKEOWN, Circuit Judges.

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* The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R.App. P. 34(a)(2).

Filed Feb. 28, 2007.

MEMORANDUM**

Rosen Alexandrov **Rusev** and Galina Yordanova Ruseva, natives and citizens of Bulgaria, petition for review of the Board of Immigration Appeals' ("BIA") orders denying their two motions to reopen, which were based on the alleged ineffective assistance of their prior counsel. We have jurisdiction under 8 U.S.C. § 1252. We review for an abuse of discretion, *see Lara-Torres v. Ashcroft*, 383 F.3d 968, 972 (9th Cir.2004), *amended by* 404 F.3d 1105 (9th Cir.2005), and we deny the petition for review.

The Rusevs concede that their motions were untimely as they were not filed within ninety days of the BIA's August 13, 2003 order. *See* 8 C.F.R. § 1003.2(c)(2). The BIA did not abuse its discretion in concluding the Rusevs are not entitled to equitable tolling of the ninety-day time limit because they failed to demonstrate they acted with due diligence after learning their prior counsel did not file a brief before the BIA. *See Iturribarria v. INS*, 321 F.3d 889, 898 (9th Cir.2003) (stating that the court recognizes equitable tolling of deadlines on motions to reopen when a petitioner is prevented from filing because of deception, fraud, or error, as long as the petitioner acts with due diligence in discovering the deception, fraud, or error) (citations omitted).

** This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

We do not consider the **Rusevs'** allegation that they did not know until July, 2004 that no brief was submitted to the BIA in support of their appeal as they failed to raise this allegation before the BIA. *See Vargas v. U.S. Dept. of Immigration and Naturalization,* 831 F.2d 906, 907-08 (9th Cir.1987).

The **Rusevs'** second motion to reopen also exceeded the numerical limitations for motions to reopen. *See* 8 C.F.R. § 1003.2(c)(2).

PETITION FOR REVIEW DENIED.

Decision of the Board of Immigration Appeals

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Files: A71 597 582 – Phoenix Date: JUN 10 2005
A71 597 583

In re: ROSÉN ALEXANDROV *RUSEV*
GALINA YORDANOVA *RUSEVA*

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENTS:
Christopher J. Stender, Esquire

ON BEHALF OF DHS: Arthur S. Raznick
Assistant Chief Counsel

ORDER:

PER CURIAM. The respondents filed a motion to reopen on April 28, 2005. We dismissed the respondents' appeal without opinion on August 13, 2003. We denied a previous motion to reopen on December 23, 2004. The pending motion to reopen was filed late. *See* 8 C.F.R. § 1003.2(c)(2). Moreover, the motion exceeds the numerical limitations for motions to reopen. *Id.* The Department of Homeland Security (the "DHS," formerly the Immigration and Naturalization Service) opposes the pending motion, which will be denied.

In our prior decision, the respondents brought a claim against former counsel, Dorothea P. Kraeger, based on her failure to file a brief in support of their appeal. We noted, however, that the motion to reopen was filed almost a year late. We also noted that the respondents hired current counsel on September 4, 2003, but the motion to reopen was not filed for over a year. The fact that Kraeger was placed on interim suspension by the Supreme Court of Arizona on March 23, 2005, does not excuse the lateness of the motion. Moreover, as noted by the DHS, on February 17, 2005, the Ninth Circuit Court of Appeals upheld the Immigration Judge's decision that "there is no objective basis for Rusev's professed fear of persecution nor any nexus to any of the five grounds necessary to establish eligibility for asylum." The Ninth Circuit considered that the lead respondent alleged no past mistreatment by the Bulgarian government, and submitted no evidence that the government or Balkan Airlines (who he claimed to fear) had any interest in him whatsoever. The Ninth Circuit has closely examined the decision of the Immigration Judge and upheld that decision, finding that the respondents' asylum claim lacks merit. The pending motion is, therefore denied.

/s/ David B. Holmes
FOR THE BOARD

Decision of the Board of Immigration Appeals

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Files: A71 597 582 – Phoenix Date: DEC 23 2004
A71 597 583

In re: ROSEN ALEXANDROV *RUSEV*
GALINA YORDANOVA *RUSEVA*

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENTS:
Christopher J. Stender, Esquire

ON BEHALF OF DHS: Arthur S. Raznick
Assistant Chief Counsel

ORDER:

PER CURIAM. The respondents' motion to reopen has been filed out of time. We dismissed the respondents' appeal without opinion on August 13, 2003. The pending motion was filed almost a year late, on September 28, 2004. *See* 8 C.F.R. § 1003.2(c)(2). The Department of Homeland Security (the "DHS," formerly the Immigration and Naturalization Service) opposes the pending motion, which will be denied.

The respondents claim that prior counsel was incompetent, because she failed to submit a brief in support of the respondents' appeal. There is, however,

no basis for abrogating the motions deadline here. An individual seeking to rely upon "equitable tolling" of a filing deadline must show that he has acted with due diligence. *See Iturribarria v. INS*, 321 F.3d 889, 899 (9th Cir.2003) (in that case, court found that to the extent that equitable tolling applies, based on actions of prior counsel, limitations period begins when respondent meets with new counsel and learns of fraud); *Singh v. Ashcroft*, 367 F.3d 1182, 1185-86 (9th Cir. 2004) (motion to reopen based on counsel failing to file a brief granted, where respondent acted with diligence in filing motion); *Matter of J-J-*, 21 I&N Dec. 976 (BIA 1997) (Board will exercise its sua sponte authority over an untimely motion only in an "exceptional situation"). *See also Matter of Jean*, 23 I&N Dec. 373 (A.G. 2002). Here, the respondents submit with the motion a complaint that they filed against former counsel with the Arizona state bar. The complaint notes that they learned of the Board's prior decision on August 25, 2003, and hired current counsel on September 4, 2003. Nevertheless, the pending motion was filed over a year after current counsel was engaged to represent the respondents. This does not show diligence in filing the pending motion. It is, therefore, denied.

/s/ David B. Holmes
FOR THE BOARD

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROSEN ALEXANDROV RUSEV; et al., Petitioners, v. ALBERTO R. GONZALES, Attorney General, Respondent.	Nos. 05-70170, 05-73947 Agency Nos. A71-597-582 A71-597-583 ORDER (Filed Sep. 19, 2005)

Before: REINHARDT and HAWKINS, Circuit Judges

The court sua sponte consolidates these petitions for review. Petition nos. 05-70170 and 05-73947 are consolidated.

Respondent's motion for summary disposition is denied because the questions raised by this petition for review are sufficiently substantial to warrant further argument. *See United States v. Hooton*, 693 F.2d 857, 858 (9th Cir. 1982) (per curiam) (stating standard).

The motion for a stay of removal filed in no. 05-70170 is granted. Accordingly, the motion for a stay of removal filed in no. 05-73947 is denied as unnecessary.

The following briefing schedule shall govern these consolidated petitions for review: the certified administrative record for petition no. 05-70170 has

been filed; the certified administrative record for petition no. 05-73947 is due November 2, 2005; the consolidated opening brief is due December 12, 2005; the consolidated answering brief is due January 11, 2006; and the consolidated optional reply brief is due within 14 days after service of the answering brief.

123 Fed.Appx. 316

United States Court of Appeals, Ninth Circuit.
Rosen Alexandrov **RUSEV**; Galina Yordanova Ruseva, Petitioners,
v.
Alberto GONZALES,* Attorney General, Respondent.

Submitted Feb. 17, 2005.**

Christopher J. Stender, Esq., Stender & Associates, Phoenix, AZ, for Petitioners.

Ronald E. LeFevre, Chief Counsel, San Francisco, CA; District Counsel, Office of the District Chief Counsel, U.S. Department of Homeland Security, Phoenix, AZ; and Mark C. Walters, Esq., and Jennifer L. Lightbody, Esq., DOJ – U.S. Department of Justice, Civil Div./Office of Immigration Lit., Washington, DC, for Respondent.

On Petition for Review of an Order of the Board of Immigration Appeals. Agency Nos. A71-597-582, A71-597-583.

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* Alberto Gonzales is substituted for his predecessor, John Ashcroft, as Attorney General of the United States, pursuant to Fed. R.App. P. 43(c)(2).

Nos. 03-73195.

** This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R.App. P. 34(a)(2).

Decided Feb. 22, 2005.

Before: ALARCÓN, SILVERMAN, and BEA, Circuit Judges.

MEMORANDUM***

Rosen Alexandrov **Rusev** and Galina Yordanova Ruseva, both natives and citizens of Bulgaria, petition for review of the Board of Immigration Appeal's ("BIA") August 13, 2003 final order of removal affirming without opinion the Immigration Judge's denial of Mr. **Rusev's** application for asylum and withholding of removal. Because the BIA streamlined and affirmed the IJ's decision without opinion, we review the decision of the IJ. *Lanza v. Ashcroft,* 389 F.3d 917, 924 (9th Cir.2004). Our review of the IJ's decision is for substantial evidence and we will grant relief only if the evidence compels such a result. *INS v. Elias-Zacarias,* 502 U.S. 478, 481 n. 1, 112 S.Ct. 812, 117 L.Ed.2d 38 (1992). We dismiss in part and deny in part **Rusev's** petition.

Substantial evidence supports the IJ's conclusion that **Rusev** failed to establish past persecution or a well-founded fear of persecution on account of his political opinion. *See Elias-Zacarias v. INS,* 502 U.S. 478, 481, 112 S.Ct. 812, 117 L.Ed.2d 38 (1992). The IJ found that there is no objective basis for **Rusev's** professed fear of persecution nor any nexus to any of

*** This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

the five grounds necessary to establish eligibility for asylum. The record before us does not compel a contrary conclusion. *See Ghaly v. INS,* 58 F.3d 1425, 1431 (9th Cir.1995). **Rusev** does not allege any past mistreatment by the Bulgarian government and his testimony fails to establish a well-founded fear of future persecution. **Rusev** testified that his greatest fear of returning to Bulgaria is being punished for "betraying" the Balkan Airlines. He submitted no evidence that Balkan Airlines or the Bulgarian government has any interest in him whatsoever, except perhaps for failing to report for required military service. **Rusev** testified, however, that he does not fear returning on account of his court-martial. But even if he did, fear of prosecution for refusing to be conscripted generally is insufficient. *See Padash v. INS,* 358 F.3d 1161, 1166-67 (9th Cir.2004).

To the extent that **Rusev** now seeks asylum on the grounds of membership in a protected social group, he is raising this for the first time on review and we lack jurisdiction over the claim. "Absent overriding justification, an alien must exhaust his administrative remedies prior to seeking review of his deportation order." *Vargas v. INS,* 831 F.2d 906, 907 (9th Cir.1987); *see also Ochave v. INS,* 254 F.3d 859, 867 n. 3 (9th Cir.2001) (concluding that claim of persecution on account of membership in a particular social group was not exhausted where asylum application claimed persecution on the basis of imputed political opinion). Exhaustion of administrative

remedies is mandatory and jurisdictional. 8 U.S.C. § 1252(d)(1).

Finally, because **Rusev** failed to establish that it is more likely than not that he will be persecuted if he returns to Bulgaria, he failed to meet the standard for withholding of removal. *See Marcu v. INS,* 147 F.3d 1078, 1083 (9th Cir.1998).

PETITION FOR REVIEW DISMISSED in part DENIED in part.

U.S. Department of Justice
Executive Office for
Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A71-597-582 – PHOENIX Date: AUG 13 2003

In re: RUSEV, ROSEN ALEXANDROV

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
Kraeger, Dorothea P., Esquire

ON BEHALF OF DHS:
Arthur S. Raznick, Assistant District Counsel

ORDER:

PER CURIAM. The Board affirms, without opinion, the results of the decision below. The decision below is, therefore, the final agency determination. *See* 8 C.F.R. § 1003.1(e)(4).

/s/ Juan P. Osuna
FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
Phoenix, Arizona

File No.: A 71 597 582/583 January 14, 2002

In the Matter of	)	IN REMOVAL
	)	PROCEEDINGS
ROSEN	)	
ALEXANDROV RUSEVA [sic]	)	
GALINA YORDANOVA RUSEVA	)	
Respondents		

CHARGE: As to each, overstay of visa, permission to be in the United States.

APPLICATIONS: Asylum, withholding of removal.

ON BEHALF OF RESPONDENTS:	ON BEHALF OF SERVICE:
Dorothy M. Kraeger, Esquire	Arthur Raznick, Esquire

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondents are husband and wife[,] aliens, natives and citizens of Bulgaria. They were placed in removal proceedings by the issuance of Notices to Appear dated February 3, 1998. At this proceeding, through counsel, each has admitted the factual allegations and conceded the charge and declined to name a country of removal. The Court has designated Bulgaria the country of nationality. Based upon those admissions, the charges are sustained.

The respondents filed an application for special rule NACARA suspension of removal, however, they are ineligible in that they entered the United States subsequent to December 31, 1990[.] [W]hile an asylum application was filed in a timely manner prior to December 31, 1991, they also has [sic] to be the entry prior to December 31, 1990. In this case, they entered the United States approximately six months to[o] late, that entry being June 29, 1991.

The male respondent has submitted an application for political asylum in which he claims he fears persecution in Bulgaria because of political opinion.

An applicant for asylum bears the evidentiary burdens of proof and persuasion in ~~the~~ [an] application for asylum under Section 208 of the Act. *Matter of Acosta,* 19 I&N Dec. 211 (BIA 1985); *Matter of Mogharrabi,* 19 I&N Dec. 439 (BIA 1987); *Matter of Z[V]-T-S-*, Int. Dec. 3308 (BIA 1997); 8 C.F.R. Section 208.13(a).

To establish eligibility for a grant of asylum, an applicant must demonstrate that he or she is a refugee within the meaning of Section 101(a)(42) of the Acts [~~date~~; 8] U.S.C. Section 1101(a)(42). *See* Section 208 of the Act. That section defines a refugee as any person who is unable or unwilling to return to his or her home country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group or political opinion. *See, also, INS v. Elias-Zacarias,* 502 U.S. 478 (1992).

An applicant has established a well-founded fear if he presents specific facts establishing that he has actually been the victim of persecution or if he shows that a reasonable person in his circumstances would fear persecution if he were returned to his native country. *INS v. Cardoza-Fonseca,* 408 U.S. 421 (1987); *Matter of Mogharrabi, supra.* An asylum applicant must also demonstrate that he merits such relief as a matter of discretion by this Court.

An alien who seeks restriction on removal or withholding of removal to any country must show that his life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group or political opinion. Section 241(b)(3) of the Act. ~~An~~ [In] order [to] makes such a ~~it~~ shown[ing] the alien must establish a clear probability of persecution on account of one of the enumerated grounds. *INS v. Stevic,* 467 U.S. 407 (1994). Accordingly, the alien's facts must establish that it is more likely than not that he would be subject to persecution on account of at least one of the specified grounds. Id.

The Court finds and concludes as follows: the respondent left Bulgaria almost 11 years ago. At the time of his departure the country was still in a state of turmoil due [sic] the overthrow of the communist government, circa 1990. Today Bulgaria is governed by a democratically elected government and has an emerging private sector economy. Bulgaria is an emerging third world country that generally respects the human rights of its citizens.

The respondent testified he is afraid of punishment for failure to go to South Africa on a job transfer. He worked for Balkan Airlines, a State owned airline. There is no objective basis for his professed fear nor is there any nexus to any of the five grounds set forth for asylum. The respondent decided not to accept the transfer and[, instead;] quit his job. ~~Instead,~~ [Thereafter,] he registered an import/export business in Bulgaria and came to the United States. He was never contacted by Bulgarian airlines. He was never threatened. There is no evidence the Bulgarian airlines or any of its employees have any interest in the respondent or have any hard or bad feelings toward him because he declined to transfer and quit the company. Even if they did, this would be an employee/employer matter not[,] necessarily[,] a grounds for asylum.

The respondent simply decided to decline transferring and left his job with Balkan Airlines. He did so and his relationship with the airlines terminated. The credible evidence establishes nothing more.

However, before quitting and coming to the United States he did register with the Bulgarian government an import/export business. A business that he subsequently utilized in the United States. A utilization that later caused him legal problems with the Phoenix police and led to his misdemeanor conviction in the Phoenix Municipal Court.

The fact the respondent was summoned for military service is immaterial. Bulgaria has mandatory military service. The respondent graduated from the military academy. The Court does not find it unusual that the respondent would be called for military service in Bulgaria. The fact the respondent is unaware of any pilots being called to active duty is not meaningful. There is no nexus to the respondent leaving Balkan Airlines unless he was exempted from military services as a civilian pilot and lost that exemption when he left that job. This is quite possible in view of the respondent's testimony that he is unaware of any civilian pilots being called for military service. There is no indication this is a ruse to punish him for quitting his job with Balkan Airlines. He has no reason to fear persecution or harm by the government.

To court-martial or criminally prosecute a person because he fails to appear for military service is not unusual in most countries of the world. There is no indication his punishment would be disproportionate. This ~~is~~ also is not ~~the~~ [a] grounds for a grant of asylum.

The reported investigation by the respondent's brother and that brother's conclusion that the respondent is viewed as a traitor to be punished for leaving Balkan Airlines is not helpful. That conclusion is not supported by credible evidence.

The fact the house of the respondent's parents was burglarized is also not helpful. Burglary is a

common crime. There is no reasonable nexus to the respondent except speculation.

The respondent has engaged [in] some serious piecing together of minor details and speculation in order to weave an asylum claim. There is simply no credible evidence that anyone in Bulgaria has any interest in the respondent or wishes to harm him[,] especially today some 11 years after he left the country[,] other than perhaps [because] of his draft evasion. After so many years it is doubtful there is even any interest because of that fact.

The testimony of Mr. Standchev has no demonstrated nexus to the respondent's asylum claim. The fact that he read [in] a newspaper ~~is~~ in the mid to late 1990s ~~at~~ [that] Balkan Airlines engaged in black marketing and read about several crashes involving Balkan Airlines is interesting, but not terribly relevant to these proceedings. The fact that two of his friends who worked for Balkan Airlines died in a plane crash in 1997 has no demonstrated nexus to this respondent or relevance to his asylum claim.

The fact is that the respondent decided to immigrate to the United States for his own purposes and is attempting to use asylum in lieu of an immigration visa. Any fears he may entertain have no nexus to any of the five grounds enumerated for asylum[,] nor does any credible evidence provide a nexus to[,] or involvement by[,] the Bulgarian government or any Bulgarian government officials.

The respondent's credibility is highly suspect in view of his elusive asylum claim, but is not based upon any credible evidence. The fact [is that] he claims to have fled involvement in illegal import/export activities in Bulgaria, yet registered an export/import business in Bulgaria shortly before leaving[,] a business he utilized in the United States to engage in a legal import/export activities involving automobiles[,] activities that eventually led to his criminal conviction in Phoenix Municipal Court. This Court simply does not believe the respondent.

Asylum will be denied. Withholding will also be denied. There is no showing of a likelihood of persecution if he returns to Bulgaria.

The respondent has not established eligibility for voluntary departure, however, even had he done so the Court would still deny such relief as a matter of discretion in view of his problems with the Phoenix, Arizona authorities and convictions in municipal court. The respondent has abused his status in the United States and is not deserving of favorable discretion by this Court. The following orders are entered:

ORDER

IT IS HEREBY ORDERED that the application for asylum is denied.

IT IS FURTHER ORDERED that the application for withholding of removal is denied.

IT IS FURTHER ORDERED that he be removed and deported from the United States to Bulgaria.

/s/ John Richardson
JOHN W. RICHARDSON
U.S. Immigration Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROSEN ALEXANDROV RUSEV; et al., Petitioners, v. ALBERTO R. GONZALES, Attorney General, Respondent.	Nos. 05-70170, 05-73947 Agency Nos. A71-597-582 A71-597-583 ORDER (Filed Jul. 13, 2007)

Before: BEEZER, FERNANDEZ, and McKEOWN, Circuit Judges

The panel has voted to deny the petition for panel rehearing.

The full court has been advised of the petition, for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied.

SUPREME COURT OF ARIZONA

In the Matter of DOROTHEA P. KRAEGER, Attorney No. 15475 Respondent.	) Arizona Supreme Court) No. SB-05-0008-D)) State Bar of Arizona) No. 05-0127)) ORDER)) (Filed Mar. 23, 2005))

A Motion for Interim Suspension was filed by the State Bar. After considering the motion, the Court finds that the motion for interim suspension should be granted. Accordingly,

(1) IT IS ORDERED that pursuant to Rule 63(c) Rules of the Supreme Court of Arizona, that **DOROTHEA P. KRAEGER** is hereby suspended from the practice of law, effective this date.

(2) IT IS FURTHER ORDERED that the suspension shall continue in effect until final disposition of all pending proceedings against **DOROTHEA P. KRAEGER** unless earlier vacated or modified.

(3) IT IS FURTHER ORDERED that **DOROTHEA P. KRAEGER** from this date shall not accept for representation any new cases; nor shall she agree to represent any existing client after the effective date of this Order.

(4) IT IS FURTHER ORDERED that **DOROTHEA P. KRAEGER** is precluded from distributing

funds from any trust account to anyone except with the written approval of bar counsel or of this court.

(5) IT IS FURTHER ORDERED that pursuant moo Rule 72(a), Rules of the Supreme Court of Arizona, **DOROTHEA P. KRAEGER** shall notify all her clients within ten (10) days from the date hereof of her inability to continue to represent them and that they should promptly retain new counsel, and shall promptly inform this court of her compliance with this Order as provided by Rule 72(e), Rules of the Supreme Court of Arizona.

DATED this 23rd day of March, 2005.

/s/ Charles E. Jones
CHARLES E. JONES
Chief Justice

TO:
Dorothea P Kraeger (Cert. Return Receipt)
Patricia Seguin, Disciplinary Clerk, (Cert. Copy)
Lisa D Duran, Quarles & Brady Streich Lang LLP, Phoenix Office
Amy K Rohm, Bar Counsel, State Bar of Arizona
Betty Flores, Manager of Membership Records, State Bar of Arizona
Roberta L Tepper, Bar Counsel, State Bar of Arizona
Sandra Montoya, Lawyer Regulation Manager, State Bar of Arizona (Cert. Copy)
Perry Thompson, United States Supreme Court (Cert. Copy)
Cathy A. Catterson, Clerk, United Sates [sic] Court of Appeals (Cert. Copy)
Richard H. Weare, Clerk, U.S. District Court (Cert. Copy)

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